**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

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| In the Matter of | ) | |
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| Restoring internet Freedom | ) | WC Docket No. 17-108 |
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**COMMENTS OF**
**THE AD HOC TELECOM USERS COMMITTEE**


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**Summary**

Three years ago, the Ad Hoc Telecom Users Committee told this Commission that every corporation in America, including the members of Ad Hoc, is an "edge provider" of internet content that depends upon an open internet to do business. Every retailer with an online catalogue, every manufacturer with online product specifications, every insurance company with online claims processing, every bank with online account management, every company advertising and selling its products via a web site – every business in America interacting with its customers online is dependent upon internet freedom.

That marketplace reality has not changed.

Nor have the essential technical and physical characteristics of internet access changed since Ad Hoc's earlier filing. From the internet's earliest days – when end users depended upon dial-up telephone lines – to today – when most end users can choose higher capacity, packet-switched connections – the internet has always required customers to access it via a "telecommunications service," as Congress defined that term in Title II of the Communications Act. The question of whether that service is "functionally integrated" into an information service or provided on a stand-alone basis is one of fact, not policy. And as a factual matter, the Commission's initial classification of internet access service in 1997 as an "information service" is simply out of step with reality today, thanks to progress in the engineering and deployment of network and internet technologies. The Commission properly updated its initial classification in 2015 and should now leave that classification unchanged.

Despite its status as a telecommunications service, the Commission can and should avoid unnecessary regulation of internet access by using the Act's forbearance authority wherever marketplace competition can protect consumers and the public interest.

Marketplace competition cannot protect customers and the public interest where it does not exist, of course. And competition does not exist for businesses seeking to communicate with a customer once the customer picks its ISP. It does not matter how competitive a market may be for internet access services or how many wireline and wireless ISP options a subscriber can choose from. Once the subscriber chooses, all businesses seeking to download content to a subscriber must use the subscriber's choice of ISP to do so. In other words, the subscriber's ISP has a monopoly on access to that subscriber by any business trying to communicate with that subscriber over the internet. The Commission has previously recognized the harm that such monopolies can cause and properly characterized them as market failures that must be addressed with appropriate regulation. The Commission must continue to do the same in the case of internet access.

In order to protect businesses from these market failures, the Commission must retain the rule that prohibits ISPs from exploiting their terminating monopoly by blocking or throttling traffic or demanding any payments from non-subscribers for access to subscribers, including "pay-for-priority" arrangements. That rule does not prevent ISPs from selling blocking, throttling, or traffic prioritization services to their own subscribers. Subscribers are free to decline such services or vote with their feet and switch to another provider if an ISP's prices for such services are too high; that is the benefit (and disciplining effect) of competitive choice. But non-subscribers seeking to communicate with an ISP's subscriber, which includes virtually every business in America, do not have that competitive choice; they can only use the subscriber's choice of access provider in order to reach the subscriber. Since no market-disciplining competition exists (or can exist) to protect non-subscribers from the ISPs' market power over terminating access, the Commission must continue to provide that protection via the existing rules.

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**THE AD HOC TELECOMMUNICATIONS USERS COMMITTEE**

The Ad Hoc Telecommunications Users Committee ("the Committee" or "Ad Hoc") hereby responds to the Federal Communications Commission's Notice of Proposed Rulemaking ("NPRM" or "Notice") [1] in the docket captioned above.

Ad Hoc's members, like every other corporation and business entity in America, are "edge providers" of internet content that depend upon internet freedom to do business with their customers. As Ad Hoc observed in its comments on internet access three years ago,[2] every retailer with an online catalogue, every manufacturer with online product specifications, every insurance company with online claims processing, every bank offering online account management, every company advertising its products and services via a web site – every business in America interacting with its customers online is dependent upon internet freedom.

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1 *Restoring Internet Freedom,* WC Docket No. 17-108, Notice of Proposed Rulemaking, 32 FCC Rcd 4434 (2017) ("*NPRM*" or "*Notice*").

2 Comments of the Ad Hoc Telecommunications Users Committee, *Protecting and Promoting the Open Internet*, WC Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601 (2015) ("*2015 Title II Order*"), filed July 18, 2014 ("*Ad Hoc Open Internet Comments*").

In order to preserve that internet freedom, the Commission must continue to recognize that today's broadband internet access service is a "telecommunications service" as defined in Title II of the Communications Act. As a result of modernization in the engineering and deployment of network and internet technologies, the Commission's classification of internet service in 1997 as an unregulated "information service" is simply out of step with reality. The Commission can avoid unnecessary regulation of internet access, despite its status as a telecommunications service, by using the Act's forbearance authority where marketplace competition is sufficient to protect customers and the public interest. But marketplace competition does not protect customers and the public interest when it comes to the monopoly power enjoyed by internet service providers ("ISPs") whenever a business seeks to download its content, such as its web pages or business documents, to the ISP's subscriber. Businesses have no choice but to use the ISP selected by the subscriber when they do so. In order to prevent ISPs from exploiting their market power over non-subscribers seeking to communicate with their subscribers, the Commission's rules must continue to prohibit ISPs from blocking, throttling, or prioritizing traffic terminating on their subscribers' internet access lines based on payment demands to content providers.

## DISCUSSION

### I. Modern Internet Access Service Is Title II "Telecommunications" as Defined by the Communications Act

Today's broadband internet access service constitutes the provision of "telecommunications" rather than "information service" under Title II of the Communications Act. This conclusion requires the Commission to make a factual determination, not to engage in a legislative policy debate, because Congress already decided the relevant policy when it defined the Commission's jurisdiction and powers under the Communications Act. As a factual matter, the Commission's earlier classification of internet access service as an "information service" is simply out of step with today's technology and should not now be revived. The Commission can easily avoid unnecessary regulation of internet access, despite its status as a telecommunications service, by using the Act's forbearance authority to de-regulate internet access services wherever marketplace competition protects consumers and the public interest.

The Communications Act confers authority on the Commission to regulate "telecommunications." The Act defines "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[3] Under the statutory definition, the key element is "transmission" and not variations in the technology or facilities used to perform that transmission.[4]

Both the Commission and the courts have interpreted the definition of "telecommunications" to include a wide range of transmission facilities and services besides traditional voice telephone service. For example, the Commission declared that frame relay service was a communications service when frame relay was in its infancy.[5]

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3 47 U.S.C. § 153(50).

4 *Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, WC Docket No. 03-45, Memorandum Opinion and Order, 19 FCC Rcd 3307, 3312 ("Under the statute, the heart of 'telecommunications' is transmission.") (2004).

5 *Independent Data Communications Manufacturers Association, Inc. Petition for Declaratory Ruling that AT&T's InterSpan Frame Relay Service is a Basic Service,* Memorandum Opinion and Order, 10 FCC Rcd 13717 (1995).

The FCC subsequently treated internet Protocol ("IP"), ATM, and MPLS services as telecommunications.[6]

By contrast, "information services" are not subject to regulation under Title II of the Act. Congress has defined an information service as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."[7] This definition describes an end user's total internet experience. But today, that end user experience results from the user's combination of many component parts, obtained from unrelated providers, including equipment manufacturers, software providers, search engines, web hosting providers, database managers, content providers, and the telecommunications services provided by the user's internet access service provider to connect end user equipment to the internet. The Commission is tasked with deciding whether the access service provided by a subscriber's ISP, not the myriad of products that subscribers combine the service with to download content from the internet, constitutes "telecommunications" or "information services."

The Commission first classified internet access service as an information service in its 1998 Report to Congress[8] which had been requested by then-Senator Ted Stevens. The Commission then relied heavily on the *Stevens Report* in subsequent decisions, repeating them with little or no updated factual analysis.[9] But in 1995, only

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6 *See, e.g., Wireline Competition Bureau Announces Release of the Revised 2009 FCC Form 499-A and Accompanying Instructions*, Public Notice, DA 09-454 (Wireline Comp. Bur., rel. Feb. 25, 2009).

7 47 U.S.C. § 153(24).

8 *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501 (1998) ("*Stevens Report*")

9 *See, e.g., Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers; Review of Regulatory Requirements for*

14% of Americans had internet access and it was provided almost exclusively via regulated dial-up telephone connections; 42% of U.S. adults had never heard of the internet.[10] By 1999, 65% of internet users still used dial-up service,[11] meaning that most of the internet access providers classified as information service providers by the Commission in 1997 did not provide telecommunications service at all; end users obtained the telecommunications services separately from their local telephone company. Moreover, the Commission relied on a variety of characteristics that no longer pertain to today's ISPs in order to classify internet access service as an information service:

- The Commission stated that internet access providers provided subscribers with the ability to run a variety of applications such as "electronic mail," "World Wide Web browsers, FTP clients, Usenet newsreaders, electronic mail clients," and "Telnet applications" over mail servers and other computer facilities owned by the ISP which thus had no "separate legal status."[12] But modern-day users obtain applications like email and browsers on a stand-alone basis from providers other than their ISP.
- The Commission stated that subscribers stored "files on internet service provider computers to establish 'home pages' on the World Wide Web"[13] and retrieved files "from the World Wide Web" by interacting with data maintained on an

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*Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements; Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided Via Fiber to the Premises; Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided Via Fiber to the Premises; Consumer Protection in the Broadband Era;* CC Docket Nos. 02-33, 01-337, 95-20, 98-10, WC Docket Nos. 04-242, 05-271, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, 14862-5, ¶¶ 12-17 (2005).

10 Pew Research Center, *The Web at 25 in the U.S.*, Feb. 2014 at 10 (available at http://www.pewinternet.org/2014/02/27/the-web-at-25-in-the-u-s/).

11 Cable Services Bureau, *Broadband Today: A Staff Report to William E. Kennard, Chairman, Federal Communications Commission*, Oct. 1999 at 23.

12 *Stevens Report,* note 8, *supra,* at 11536-9, ¶¶ 75-78.

13 *Id.* at 11537, ¶ 76.

internet access provider's facilities.[14] Today, web content is maintained by a variety of means, including specialized web hosting providers or content providers themselves who purchase and manage their own web servers.

- The Commission stated that internet service didn't include transmission between "points specified by the user" because a web page proprietor did not know who would seek to download its files and thus did not specify the points to which its files would be transmitted.[15] Modern-day internet access providers are separate from web page proprietors, however, and the "points" to which they connect their subscribers are the web pages specified by the subscriber and stored by separate hosting services.

Viewed from the perspective of a 1998 customer, today's internet access would be unrecognizable. In today's world, customers obtain internet access service on an entirely separate basis from web hosting, web browsers, applications, "newsgroup" services, customer premise equipment (which now includes highly sophisticated hardware and software), email servers, etc. While ISPs are free to offer those functionalities as well, they are no longer "inextricably intertwined" with internet access to create an information service.

In short, internet access has evolved since the Commission's first in-depth analysis of the service in the *Stevens Report*. The functionalities that provided a "capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications"[16] were the exclusive province of ISPs. Now those functionalities are obtained separately by increasingly sophisticated users from a broad range of stand-alone providers "via

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14 *Id.* at 11538, ¶ 76.

15 *Id.* at 11537, ¶ 76.

16 *See* note 7, *supra.*

telecommunications"[17] provided separately by the ISPs. Even less sophisticated users understand that Gmail is not a service they obtain from their cable company, though the connection by which they access Gmail is.

Accordingly, the Commission's 2015 decision to re-examine where, as a factual matter, internet access service belongs in the statutory taxonomy mandated by Congress was more than justified by the passage of time. As a factual matter, the Commission's 1998 rationale for classifying internet access service as an "information service" no longer matched the reality on the ground. The Commission's *2015 Title II Order*[18] properly concluded that, as a factual matter, today's internet access service provides telecommunications, not information services.

The appropriate statutory classification of internet access is, of course, a separate question from how the service *should* be regulated, as a Title II service that *can* be regulated. Competitive conditions vary, not only geographically but by type of user. Thus, a subscriber selecting its ISP may have competitive alternatives that make forbearance from regulation of that transaction necessary and beneficial. But businesses trying to communicate with that subscriber after the subscriber makes a choice have no competitive alternatives. As discussed below, the Commission's statutory obligation is to implement regulations that protect the public from the ISP's monopoly power in that setting.

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17 *Id.*

18 *See* note 2, *supra.*

## II. The Commission's Regulatory Regime Must Protect Customers and Edge Providers from the "Last Mile" Terminating Monopoly of Internet Access Providers

The Commission has recognized repeatedly that telecommunications providers exercise market power over access to their subscribers. Their market power stems from the fact that, regardless of how competitive a telecommunications service market may be when a subscriber is choosing a provider, once the subscriber chooses a provider, that provider has a monopoly over access to the subscriber. In the case of internet access service, businesses seeking to communicate with a subscriber have no choice but to use the subscriber's chosen ISP on the provider's terms. The Commission has also recognized that ISPs have the economic incentive and ability to diminish internet freedom by discriminating in the delivery of content from unaffiliated businesses or by extracting fees from them.[19] Instances of actual ISP interference with internet freedom is well-established,[20] putting to rest any claims that there is no need for clear rules to protect internet freedom. For the reasons discussed below (and in pleadings in prior proceedings on these topics[21]), Ad Hoc supports Commission adoption of effective "rules of the road" to ensure internet freedom in light of the ISPs' terminating monopoly and the resulting market failure that it creates for edge providers like American businesses.

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19 *Protecting and Promoting the Open Internet*, WC Docket No. 14-28, Notice of Proposed Rulemaking, 29 FCC Rcd 5561 (2014) ("*2014 Notice"*) at 5576-7, ¶¶ 42-43.

20 *E.g., id.* at 5567-8, ¶ 18 and 5575-6, ¶ 41; *Preserving the Open Internet*, *Broadband Industry Practices*, GN Docket No. 09-191, WC Docket No. 07-52, Report and Order, 25 FCC Rcd 17905, 17925-6, ¶¶ 35-36 (2010) ("*2010 Open Internet Order*"). *See also Net Neutrality Violations: A Brief History, April 2017 (available at* https://www.freepress.net/blog/2017/04/25/net-neutrality-violations-brief-history).

21 Comments of the Ad Hoc Telecommunications Users Committee in *Preserving the Open Internet; Broadband Industry Practices*, GN Docket No. 09-191, WC Docket No. 07-52, 25 FCC Rcd 17905 (2010), filed Jan. 14, 2010 ("*Ad Hoc 2010 Comments*") at 7-13.

A. Competition in the internet access market cannot counteract the ISPs' terminating access monopoly

A competitive internet access service market will produce greater innovation, more capital investment, higher broadband speeds, lower unit pricing, and greater consumer choice. But the level of competition facing subscribers in the broadband internet access market has only limited relevance in this proceeding, where the Commission must also identify the appropriate regulatory framework for unimpeded transmission to the subscriber of content of the subscriber's choosing. Even with a robustly competitive subscriber market, FCC-enforced rules of the road are still necessary to prevent ISPs from (i) discriminating in the delivery to their subscribers of content from non-affiliated content providers or (ii) exploiting their terminating access monopoly by demanding fees from content providers to deliver or prioritize content. Competition in the consumer broadband market, no matter how robust it may be, cannot constrain the market behavior of a subscriber's ISP towards the businesses seeking to communicate with that subscriber. Once a subscriber selects an ISP, businesses and other edge providers have no option for communicating with the subscriber besides that ISP, regardless of the competitive choices available to the subscriber at the time of selection. As the Commission itself stated in an earlier proceeding to examine internet openness, "even if there is competition among broadband internet access providers, once an end-user customer has chosen to subscribe to a particular broadband internet access service provider, this may give that broadband internet access service provider the ability … to favor or disfavor any traffic destined for that subscriber."[22]

[22] *Preserving the Open Internet*, *Broadband Industry Practices*, GN Docket No. 09-191, WC Docket No. 07-52, Notice of Proposed Rulemaking, 24 FCC Rcd 13064, 13094-5, ¶ 73 (2009) ("*2009 NPRM*").

B. <u>The Commission has previously solved this market failure through regulatory intervention.</u>

As Ad Hoc described in its 2010 Comments on these issues,[23] the Commission has addressed this very market dynamic when it reviewed terminating access charges in the switched voice market. The Commission's analysis and approach in that context is instructive for this proceeding because the terminating charges imposed by local exchange carriers ("LECs") on interexchange carriers ("IXCs") terminating long distance calls to the LECs' customers are analytically identical to the types of charges ISPs seek to impose on unaffiliated content providers for delivery and prioritization of content to the ISPs' subscribers.

In the case of terminating access for switched voice services, the Commission observed that "[f]or terminating access, the choice of service provider is made by the *called* party. ... The *calling* party, or its long-distance service provider, has little or no ability to influence the *called* party's choice of service provider." [24] The Commission concluded that "even with a competitive presence in the market, terminating access may remain a bottleneck controlled by whichever LEC provides access for a particular customer. As such, the presence of unbundled network elements or facilities-based competition may not affect terminating access charges."[25] Ultimately, the Commission determined that, when companies are required to pay terminating access charges,

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23 *Ad Hoc 2010 Comments*, note 21, *supra*, at 10-12.

24 *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, Usage of the Public Switched Network by Information Service and Internet Access Providers,* CC Docket Nos. 96-262, 94-1, 91-213, 96-263, Notice of Proposed Rulemaking, Third Report and Order, and Notice of Inquiry, 11 FCC Rcd 21354, 21472, ¶ 271 (1996) ("*1996 Access Reform Order*") (subsequent history omitted) (emphasis added).

25 *Id.*

"[b]ecause the paying parties do not choose the carrier that terminates their interstate calls, competitive LECs potentially could charge excessive prices for terminating access."[26]

Five years later, the Commission made substantially the same observation in its April 2001 CLEC Access Charge Order:

> [I]t appears that the CLECs' ability to impose excessive access charges is attributable to two separate factors. First, although the end user chooses her access provider, she does not pay that provider's access charges. Rather, the access charges are paid by the *caller's* IXC, which has little practical means of affecting the…*called party's* choice of provider…and thus cannot easily avoid the expensive ones. Second, the…IXCs are effectively unable either to pass through access charges to their end users or to create other incentives for end users to choose LECs with low access rates, [so that] *the party causing the costs – the end user that chooses the high-priced LEC – has no incentive to minimize costs*. Accordingly, CLECs can impose high access rates without creating the incentive for the end user to shop for a lower-priced access provider.[27]

The Commission then determined that the market's failure to constrain terminating access rates created the opportunity for terminating access providers to charge unreasonable rates and that Commission action was required to prevent CLECs from exploiting their market power in the rates they imposed for switched access services.[28] In subsequent access charge decisions, the Commission repeatedly characterized the actions it took in the 2001 CLEC Access Charge Reform Order as necessary to address a "market failure."[29]

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26 *Id.* at 21476, ¶ 279.

27 *Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, CC Docket No. 96-262, Seventh Report And Order And Further Notice Of Proposed Rulemaking, 16 FCC Rcd 9923, 9935-6, ¶ 31 (2001) ("*CLEC Access Charge Order*") (emphasis added).

28 *Id.* at 9936, ¶ 34.

29 *See, e.g., Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers; Petition of Z-Tel Communications, Inc., for Temporary Waiver of Commission Rule 61.26(d) to Facilitate Deployment of Competitive Service in Certain Metropolitan Statistical Areas,* CC Docket No. 96-262, CCB/CPD File No. 01-19, Eighth Report and Order and Fifth Order on

The "market failure" that the Commission addressed for switched voice services is identical to the market failure faced by businesses seeking to communicate with an ISP's subscriber.[30] The subscriber chooses the ISP who is then in exactly the same position as LECs who are terminating switched voice traffic, in terms of the ISP's incentive and ability to make unreasonable demands on companies communicating with the subscriber over the internet. As was true for calling parties and IXCs, the content, application, or service provider on the internet has no practical means of disciplining excessive charges by the subscriber's ISP. The economic imperative to regulate access charges in the switched voice market is thus equally applicable to the market for broadband internet access services. As it did for switched access service, the Commission must adopt an explicit rule that prohibits ISPs from exploiting their terminating monopoly at the expense of non-subscribers.

Nor is it reasonable, as some commentators have suggested in the past, to rely upon consumer demand for particular content to prevent ISPs from demanding

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Reconsideration, 19 FCC Rcd 9108, 9110, ¶ 4 (2004); *Access Charge Reform; PrairieWave Telecommunications, Inc. Petition for Waiver of Sections 61.26(b) and (c) or in the Alternative Section 61.26(a)(6) of the Commission's Rules; SouthEast Telephone, Inc. Petition for Waiver of Section 61.26(a)(6) of the Commission's Rules; Cox Communications, Inc. Petition for Clarification or Reconsideration*, CC Docket No. 96-262, Order, 23 FCC Rcd 2556, 2557, ¶ 2 (2008); *Petition of OrbitCom, Inc. for Forbearance from CLEC Access Charge Rules,* WC Docket No. 08-162, Memorandum Opinion and Order, 23 FCC Rcd 13187, 13188, ¶ 3 (2008); *Petition of Northern Telephone & Data Corp. for Waiver of Section 61.26(b)(1) of the Commission's Rules*, WC Docket No. 09-216, Order, 25 FCC Rcd 274, 275, ¶ 3 (2010).

30 The Commission faced a similar market dynamic when it considered rules to facilitate "calling party pays" for the CMRS market. *See Calling Party Pays Service Offering in the Commercial Mobile Radio Services*, WT Docket No. 97-207, Declaratory Ruling and Notice of Proposed Rulemaking, 14 FCC Rcd 10861 (1999). In that proceeding, Ad Hoc pointed out the structural defects presented by a "calling party pays" model and the terminating access market for switched voice services. Comments of the Ad Hoc Telecommunications Users Committee on the Notice of Proposed Rulemaking, WT Docket 97-207, at 8-11 (filed Sept. 17, 1999). The Commission ultimately did not approve calling party pays as a pricing model.

payments from non-subscribers as a condition for access to the ISP's subscriber.[31] While it is conceivable that an ISP might be forced to allow access to certain content or content providers because the ISP's customers demand it, such demand would only apply to the largest and most well-known content providers. Small start-ups, companies with little funding or name recognition, and those in the process of building their customer base – the types of entities that have benefitted so mightily from internet freedom – would have little recourse or leverage against ISPs whose customers were insufficiently numerous or vocal in demanding access to their content.

C. ISP charges to non-subscribers for blocking, throttling, and traffic prioritization allow internet access providers to exploit their terminating monopoly

In 2010, the Commission adopted a rule that prohibited ISPs from engaging in content-based discrimination when transmitting network traffic over a consumer's broadband internet access service.[32] The Commission indicated in the *2010 Open Internet Order* that paid prioritization of specific content would likely be prohibited under any new rule.[33] In its comments in that proceeding, Ad Hoc strongly supported the Commission's adoption of a non-discrimination rule and its putative ban on paid prioritization because such a rule provides an effective remedy for the market failure described above.[34]

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31 *See, e.g., 2009 NPRM*, note 22, *supra,* at 13095, ¶ 74 n.171 (quoting a commentator that suggested if AT&T tries to charge Google for the right to stream video over its high-speed fiber, Google could refuse to pay it, and AT&T "might" allow unfettered access to Google because its customers demand it).

32 *2010 Open Internet Order*, note 20, *supra*, at 17944, ¶ 68.

33 *Id.* at 17947, ¶ 76.

34 *Ad Hoc 2010 Comments*, note 21, *supra*, at 7-13.

This market failure requires that any reformulation of the non-discrimination rule include a ban on paid prioritization agreements as well as a prohibition against ISPs imposing or collecting charges for priority (discriminatory) treatment of a specific content provider's traffic. Discriminatory treatment of traffic by an ISP can only be reasonable if it applies uniformly to similar types of traffic, regardless of the content or content provider's identity, and even then must be limited to technical requirements for network management. In the absence of such limitations, ISPs will face no meaningful restrictions on their ability and incentives to harm the public interest with unreasonably discriminatory practices.

## III. The Commission has Previously Determined that Bill-and-Keep is the Most Economically Sound Framework for These Market Issues

In the *USF/ICC Transformation Order*,[35] the Commission adopted "bill-and-keep" as the optimal economic framework and ultimate end state for intercarrier compensation (after a multi-year transition to that end state). Bill-and-keep refers to a payment model under which service providers bill only their own customers for service, not interconnecting service providers or the customers of those interconnecting providers, i.e., content and edge providers. The Commission found that "a bill-and-keep framework for intercarrier compensation best advances the Commission's policy goals and the public interest, driving greater efficiency in the operation of telecommunications

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35 *Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing a Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up; Universal Service Reform—Mobility Fund;* WC Docket Nos. 10-90, 07-135, 05-337, 03-109, CC Docket Nos. 01-92, 96-45, GN Docket No. 09-51, WT Docket No. 10-208, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC 17663 (2011) ("*USF/ICC Transformation Order*").

networks and promoting the deployment of IP-based networks."[36] The economic and policy analysis which compelled the Commission to adopt bill-and-keep for intercarrier compensation is equally applicable to internet access service and compels the same result, for several reasons.

First and most fundamentally, as the Commission has stressed, a bill-and-keep regime reflects the market more accurately than other potential payment mechanisms: "Bill-and-keep brings market discipline to intercarrier compensation because *it ensures that the customer who chooses a network pays the network for the services the subscriber receives*."[37] The customer has the incentive to choose the most efficient alternative because "a bill-and-keep framework helps reveal the *true cost* of the network to potential subscribers."[38] Bill-and-keep "provides better incentives for carriers to operate efficiently by better reflecting those efficiencies (or inefficiencies) in pricing signals to end-user customers."[39]

Moreover, by enabling potential subscribers (and competitors) to identify the most economically efficient service provider, bill-and-keep preserves the market forces that exert downward pressure on pricing, incent innovation, and encourage efficient behavior by providers, protecting both consumers and marketplace competition. If, instead of recovering its costs from the customer who selects it, a last-mile carrier were permitted to exploit its terminating access monopoly and extract some portion of its costs from non-subscribers, this critical market signaling would be disrupted. The

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[36] *Id.* at 17905, ¶ 741.

[37] *Id.* at 17905-6, ¶ 742 (emphasis added).

[38] *Id.* at 17908, ¶ 745 (emphasis added).

[39] *Id.* at 17909, ¶ 746.

subscriber would not see the full cost associated with a choice of provider, while the non-subscribers that have no choice but to use the last-mile provider selected by the subscriber would be forced to pay any charges that provider imposes. As the Commission found in the *USF/ICC Transformation Order*, in such a case, “subscribers [would] not have accurate pricing signals to allow them to identify lower-cost or more efficient providers.”[40] By contrast, a bill-and keep regime assures that the customer for the last-mile provider sees the entire cost of the connection, which means that the customer can take cost into account in choosing among competitive alternatives – and this, in turn, “gives carriers appropriate incentives to serve their customers efficiently.”[41]

In short, the bill-and-keep model keeps markets honest and the resulting downward pricing pressure, incentives to innovate, and heightened economic efficiencies benefit both consumers and marketplace competition, all of which best serve the public interest. Allowing service providers to hide their true costs and efficiencies by using their terminating monopoly to extract payments from non-subscribers does none of these things.

In addition to preserving competitive market forces and incenting economically efficient behavior by providers, bill-and-keep is consistent with the Commission’s broader cost-causation principles in the access arena. The Commission has long recognized that each party to a communication should pay its own share of the costs. In particular, the calling party (meaning, in the case of internet access, the ISP subscriber downloading content) should pay for its connection since “the subscription

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40 *Id.* at 17908, ¶ 745.

41 *Id.* at 17906, ¶ 742.

decisions of the [downloading] party play a significant role in determining the cost of [downloading content] to that party."[42]

Importantly, the Commission has previously rejected claims made by a number of LECs that a bill-and-keep regime is appropriate only where traffic is "roughly in balance."[43] Again, because both parties share in the benefits of a connection between them, it is appropriate that they share its costs. And the sharing mechanism that is most efficient is bill-and-keep, since it places on each party the burden of the costs of the provider (and bandwidth) that party has chosen in order to connect its location to the greater network.[44]

Finally, the Commission pointed out that bill-and-keep has the virtue of much greater administrative simplicity than other mechanisms for setting intercarrier compensation, which require extremely burdensome, costly, and time-consuming procedures at both the state and federal level.[45]

All of these considerations bear directly on the Commission's decision-making in this proceeding, and militate strongly against "paid prioritization" arrangements. Under such arrangements, an ISP would be permitted to extract payments from a non-subscribing content providers as a condition of delivering the non-subscriber's packets to the ISP's subscribers on a priority basis or at a higher speed compared to other

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[42] *Id.* at 17907-8, ¶¶ 744-745.

[43] *Id.* at 17913, ¶¶ 755-756.

[44] *Id.* at 17913, ¶ 756. As the Commission points out, indeed, bill-and-keep may be even more efficient when traffic is not balanced in that it eliminates uneconomic incentives to game other regimes, such as reciprocal compensation. *Id.*

[45] *Id.* at 17906, ¶ 743.

traffic.  The effect of such an arrangement is that non-subscribers who do not pay would see their packets relegated to steerage-class status.

Allowing such arrangements would be market-distorting in two respects.  First, thanks to their terminating monopoly, ISPs would have no incentive to price "pay-for-priority" arrangements to reflect efficient cost recovery nor would there be any competitive pressure to do so.  Just like last-mile providers in the intercarrier compensation arena, every ISP has a monopoly to exploit once the subscriber selects an ISP, as discussed in Section II above.  Even if the ISP were to use content provider payments to subsidize its prices to the end user,[46] doing so would hide from end users the true cost of their connections, and prevent them from choosing providers on an economically efficient basis. To quote again the Commission's *USF/ICC Transformation Order* analysis discussed above, "subscribers [would] not have accurate pricing signals to allow them to identify lower-cost or more efficient providers."[47]

Second, pay-for-priority arrangements or non-subscriber payments to avoid blocking or throttling traffic would distort the consumer's choices in the marketplace for the non-subscriber's products and services.  Consumers would see (at least) two classes of non-subscribers, the fast and the slow, which would inevitably affect their choice of product to consume or otherwise distort competition in the non-subscribers' markets.  But the speed of delivery of a "fast" non-subscriber's content would have nothing to do with the non-subscriber's choice to deliver its content in a more efficient way (by, for example, buying more capacity on its "originating" end to deliver its

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[46] Of course, ISPs might instead use these payments to pad their profits as a form of monopoly rents, but this would hardly enhance consumer welfare or economic efficiency.

[47] *USF/ICC Transformation Order,* note 35, *supra*, at 17908, ¶ 745.

products into the internet backbone). Speed differences would instead reflect only the non-subscriber's decision (made under economic duress) to pay the subscriber's ISP not to bump the non-subscriber's traffic to the back of the line.

To be sure, it is appropriate that the non-subscriber bear an appropriate share of the cost of delivering its content, but it will do this by paying its *own* ISP for sufficient capacity – and by picking an ISP on the basis of that ISP's ability to provide such capacity efficiently and reliably – so that content delivery is not compromised at its "originating" end. At the non-subscriber's end, unlike the "terminating" end where the subscriber to whom content is directed controls the choice of provider, the non-subscriber has an actual choice. And by making this choice in a competitive environment, non-subscribers will be able to act on accurate price signals, which means that their choices will reward efficiency, innovation, and cost management by ISPs.

None of the market-distorting, anti-consumer effects identified above arise if ISPs offer *directly to their own subscribers* the option of paid prioritization, blocking, or throttling of traffic when the subscriber faces an ISP market that is competitive. Thus, for example, a subscriber who can choose from internet access service provided by a cable company, ILEC, wireless provider, or other broadband provider is free to base a selection on whether the ISP offers an option to speed up service delivery for an additional charge. Under the existing rules, ISPs are free to offer subscribers an option whereby the *subscriber* could choose, for example, to download one or more streaming videos or music content at a higher bit rate while using slower speeds for e-mail and other websites. When ISPs offer such services directly to subscribers, the presence of marketplace competition and consumer choice can spur innovative, efficiencyenhancing service options, unlike ISP charges to non-subscribers which would merely exploit the ISP's terminating monopoly.  The Commission can ensure that subscribers have the benefits of blocking, throttling, and prioritization service, to the extent there are any, simply by requiring ISPs to offer those options only to their own subscribers rather than compelling non-subscribers to pay more under the threat of inferior connections to subscribers.

## CONCLUSION

For the reasons discussed above, the Commission should retain its classification of internet access as a "telecommunications service" and apply a "bill and keep" regulatory regime to ISPs in order to protect the public interest, consumers, and competition from the ISPs' terminating monopoly.

Respectfully submitted,

**AD HOC TELECOM USERS COMMITTEE**

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**Certificate of Service**

I, Michaeleen Terrana, hereby certify that true and correct copies of the preceding Comments of Ad Hoc Telecom Users Committee were filed this 17th day of July, 2017, via the FCC's ECFS system.

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